SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 112

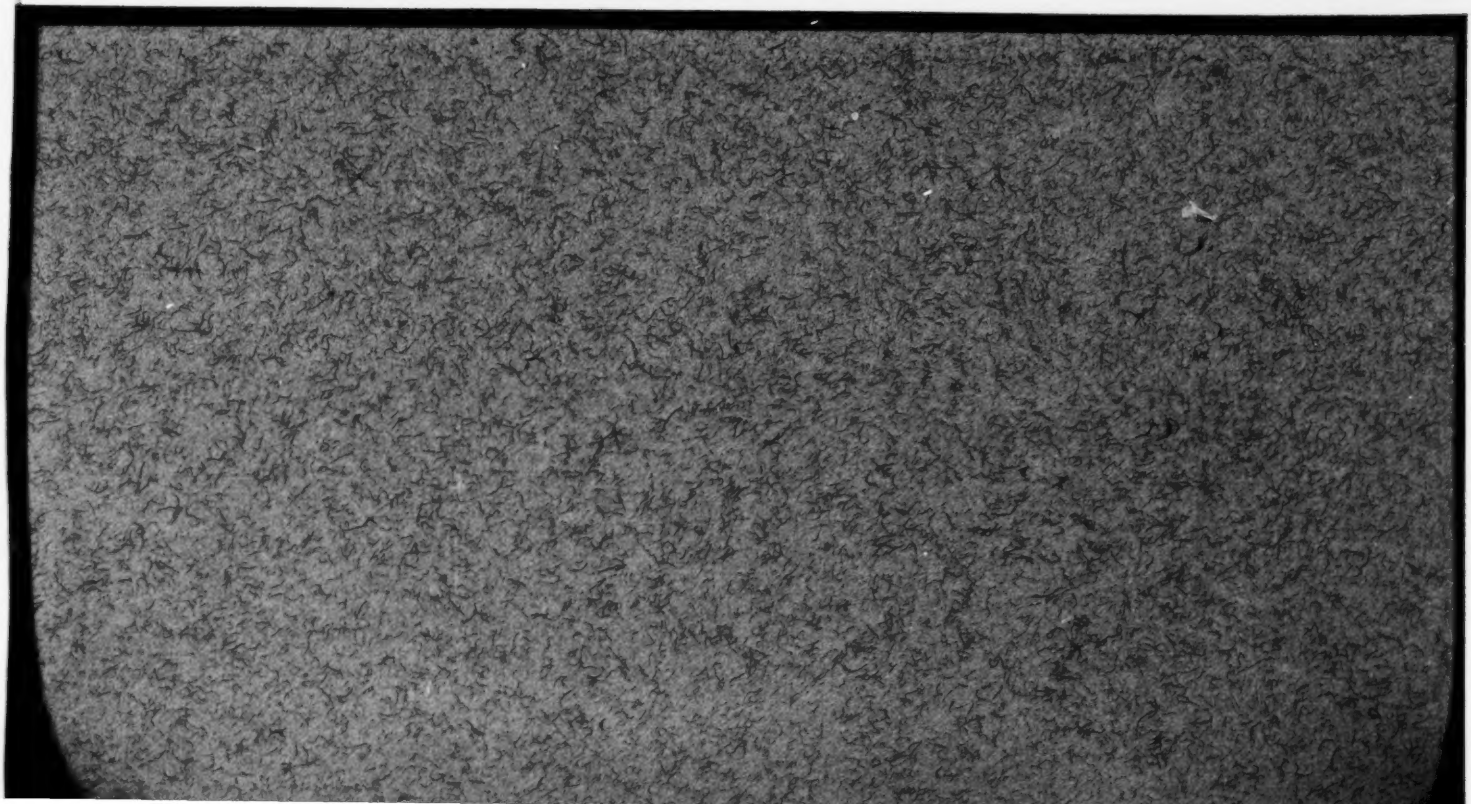
E. E. GENTRY

vs.

THE STATE OF NORTH CAROLINA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA AND BRIEF IN SUPPORT THEREOF.

W. H. STRICKLAND,
Counsel for Petitioner.



INDEX

Table of Cases Cited

Statutes Cited

Textbooks Cited

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SUMMARY

Your petitioner, E. E. Gentry, petitions this Honorable Court for a writ of certiorari to issue to the Supreme Court of North Carolina, and would respectfully show:

That your petitioner was indicted in the Superior Court of Caldwell County under a bill of indictment as appears in the record (R. 2) charging the crime of embezzlement under the following North Carolina General Statute 14-90: "If any person exercising a public trust or holding a public office, or any guardian, administrator, executor, trustee, or any receiver, or any other fiduciary, or any officer or agent of a corporation, *or any agent,* consignee, clerk, bailee or servant, except persons under the age of sixteen years, of

any person, shall embezzle or fraudulently or knowingly and willfully misapply or convert to his own use any money, goods or other chattels, bank note, check or order for the payment of money issued by or drawn on any bank or other corporation, or any treasury warrant, treasury note, bond or obligation for the payment of money issued by the United States or by any State, or any other valuable security whatsoever *belonging to any other person* or corporation, which shall have come into his possession or under his care, he shall be guilty of a felony, and shall be punished as in cases of larceny."

The State contended that the prosecuting witness had employed the defendant as his agent to negotiate a loan upon the prosecuting witness's automobile for the purpose of refinancing certain indebtedness alleged to have existed in the State of Maryland. In order to make out a crime of embezzlement against the defendant under General Statutes 14-90, and the decisions of the North Carolina Supreme Court, it was necessary to show that the prosecuting witness had some interest in the fund alleged to have been embezzled, or that he was the owner of such fund, to do this the State relied upon an alleged chattel mortgage (Exhibit "D", R. 9), which the prosecuting witness said on direct examination that the signature on the chattel mortgage was not his signature (R. 8, Line 16 *et seq.*). The witness likewise on cross examination (R. 13) stated that he had told Mr. Ervin, the prosecuting attorney, that it was not his signature on the mortgage, and that it was not his signature. The State offered in evidence the motrgage over defendant's objections, and the defendant reserved exception (R. 9). The question of admissability of the forged or illegal document was presented to the Supreme Court of North Carolina by petitioner's assignment of error No. 7 (R. 27). The Supreme Court of North Carolina declined to pass upon the question presented, *State* v. *E. E. Gentry,* 228 N. C. 643,

opinion filed March 24, 1948, by disregarding that assignment of error in its entirety, and upheld a conviction and sentence of three years imprisonment. It is to be noted that the prosecuting witness, Woodrow Price, did not own the fund, nor did he have any interest therein because the mortgage introduced in evidence did not bear his signature according to his testimony and, therefore, did not create a lien upon the car. In addition thereto the witness, Luther Bolick, testified on cross examination (R. 14) "We simply made Mr. Gentry a loan of $500.00 and accepted those papers as collateral on that loan." Thus it will be seen that the source which furnished the money loaned the money to the defendant, E. E. Gentry, and the prosecuting witness had no interest therein. Your petitioner contends:

1

That the admission of the said document in evidence when the prosecuting witness testified on direct examination and again on cross examination that he did not sign said document; that such fact was within the knowledge of the State's attorney, and that when he insisted upon its reception as evidence not to establish the forgery of the instrument, but to establish the validity of the instrument in order to make out his case that the same was in violation of Amendment Five of the Constitution of the United States, wherein among other things it is provided, "No person shall not be deprived of life, liberty, or property, without due process of law."

2

Your petitioner contends likewise that the admission of said invalid chattel mortgage was also in violation of Amendment Fourteen of the United States Constitution, which among other things provides as follows, "Nor shall any State deprive any person of life, liberty, or property

without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

3

That your petitioner relied upon these federal questions and asked for a non-suit and dismissal of the action at the close of the State's evidence, and the Supreme Court of North Carolina declined to rule upon the issue thus presented.

Jurisdiction

This Court has jurisdiction to review the opinion of the Supreme Court of North Carolina for the reason that it involves a construction of the Fifth and Fourteenth Amendments of the United States Constitution as above set out.

That your petitioner has been unable thus far to find any decision of the Supreme Court of the United States ruling directly upon the point presented. There are decisions analagous to the questions here presented. They seem to hold that the defendant could not be convicted upon forged evidence when the circumstances of the case, and the Statute involved require *that* evidence to be received as a genuine and valid document in order to make out a case.

This Court further has jurisdiction for the reason that the opinion of the Supreme Court of North Carolina is final in its effect, and that your petitioner has no right to petition said Court for a rehearing of said cause.

WHEREFORE, it is respectfully prayed that this petition for a writ of certiorari be allowed, and that the writ be granted to review the judgment and opinion of the Supreme Court of North Carolina, and your petitioner will ever pray.

W. H. STRICKLAND,
Counsel for Petitioner,
Lenoir, North Carolina.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The opinion of the Supreme Court of North Carolina sought to have reviewed, is reported in 228 N. C. at Page 643, and is appended to the record certified by the Clerk of the Supreme Court of North Carolina and attached to the record proper.

It is to be observed that the crime of embezzlement is not a common law offense; that the crime and penalties provided therefor are purely statutory and are embraced in North Carolina General Statutes, Section 14-90, which is as follows: "If any person exercising a public trust or holding a public office, or any guardian, administrator, executor, trustee, or any receiver, or any other fiduciary, or any officer or agent of a corporation, *or any agent,* consignee, clerk, bailee or servant, except persons under the age of sixteen years, of any person, shall embezzle or fraudulently or knowingly and willfully misapply or convert to his own use any money, goods or other chattels, bank note, check or order for the payment of money issued by or drawn on any bank or other corporation, or any treasury warrant, treasury note, bond or obligation for the payment of money issued by the United States or by any State, or any other valuable security whatsoever *belonging to any other person* or corporation, which shall have come into his possession or under his care, he shall be guilty of a felony, and shall be punished as in cases of larceny." The Supreme Court of North Carolina has held in *State* v. *Hill,* 91 N. C. 561, that the crime of embezzlement is not a common law offense.

The crime and penalties provided therefor being purely Statutory, the Statute must be strictly construed. *State* v. *Crawford,* 198 N. C. 522; *State* v. *Heath,* 87 A. L. R. 37; *State* v. *Baker,* 199 N. C. 578; *State* v. *Briggs,* 203 N. C. 158. From the foregoing statute it is to be observed that the

State must prove that the property alleged to have been embezzled was the property of the prosecuting witness. In *State* v. *Barton*, 125 N. C. 702 (34 S. E. 553), it is held that in order to convict an agent of the principal of embezzlement that the principal must own the property alleged to have been embezzled.

In the case at bar the only means by which the prosecuting witness could acquire any interest in the money alleged to have been embezzled was to have established that the chattel mortgage, Exhibit "D," negotiated to the Finance Company as collateral for a loan made to the petitioner Gentry, and not to the prosecuting witness, bore the prosecuting witness's genuine signature, and contrary to proof of that fact the State proved that the prosecuting witness did not sign the mortgage introduced as State's Exhibit "D." Your petitioner understands and contends that the only instance in which a forged document could or would be legally received into evidence would be for the purpose of attack, or for the purpose of establishing a forgery. Such is not the case at bar, but on the contrary the State had to introduce what the State had shown by its prosecuting attorney and its prosecuting witness, a mortgage that was forged and, therefore, invalid and if the Court accepted it at all, it had to accept the said mortgage as being genuine and bearing the genuine signature of the prosecuting witness because that mortgage was necessary to establish some ownership of the money in the prosecuting witness before defendant could be guilty of embezzlement.

Your petitioner contends that the forged document having been introduced as genuine and having been repudiated by its alleged maker that it comes within the same category as perjured testimony.

An analagous situation is presented for *Hysler* v. *State of Florida*, 86 L. Ed. 932, wherein it is held that where

perjured testimony is relied upon for a criminal conviction and the State's attorney is aware of the fact that the testimony is perjured then it is a violation of the due process clause as contained in the Fourteenth Amendment to the United States Constitution. The Court cites as authority for that position the case of *Mooney* v. *Holohan*, 294 U. S. 103.

Certainly, there is or should be no distinction made between perjured oral testimony, upon which a conviction is obtained, and forged documentary testimony which is proven by the State's attorney through his witness to be forged with respects to a compliance with the due process law of the Fifth and Fourteenth Amendments of the Constitution of the United States. The evidence in both cases is false and in the case at bar the forged document in question to-wit, Exhibit "D," the chattel mortgage, had to bear the genuine signature of Woodrow Price, the prosecuting witness, before the State could make out a case. It is, therefore, respectfully submitted that its admission in evidence as a legal document for the purpose of making out a case against the petitioner was in violation of the due process clause.

Wigmore on Evidence, Third Edition, Volume VII, Section 2130, provides as follows: "The general principle has been enforced that a writing purporting to be of a certain authorship cannot go to the jury as possibly genuine, merely on the strength of this purport; there must be some evidence of the genuineness (or execution) of it."

This Court has gone much further than it is being asked to go at the case at bar in connection with confessions alleged to have been obtained under duress. In *Brown* v. *State of Mississippi*, 297 U. S. 278, 80 L. Ed. 682, it is held that the use of a confession obtained by coercion, brutality and violence as a basis for a conviction and sentence con-

stituted a denial of due process. That is the uniform holding of the Court in the cases involving the use of excessive force, or coercion in obtaining confessions are usually accompanied by a conflicting testimony. The testimony of the officers being to the effect that no excessive force has been used and the testimony of the defendant is that excessive force has been used.

In the case at bar, however, there is no conflict of testimony, the State through its attorney, having proven by the State's witness, Woodrow Price, that Woodrow Price's signature to the chattel mortgage shown as Exhibit "D" was a forgery, the same was not admissable in evidence in this case where it was necessary to establish the legality of said instrument as well as the genuineness of the signature thereto.

Conclusion

Your petitioner respectfully submits that in the trial of this action for embezzlement when the prosecuting witness denied his signature to the mortgage securing the money in question, and the party advancing the money (who was also a witness for the State) having testified that his company had advanced the money as a loan to your petitioner, it is respectfully submitted that the State secured its conviction upon false and forged evidence and that the same constituted a violation of the due process clause of the Fifth and Fourteenth Amendments of the Constitution of the United States. That your petitioner has been unable to find any case where the Court has ruled directly upon the question here presented, but that it is of sufficient importance to establish whether or not convictions may be based upon forged documentary evidence when such forged documentary evidence has to be genuine in order to make a case, that the court should allow this petition in order that the

due process clause of the Federal Constitution may not again be violated, and persons deprived of their liberty through convictions upon false testimony.

Respectfully submitted,

W. H. STRICKLAND,
Counsel for Petitioner,
Lenoir, North Carolina.

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